Supreme Court, U. S.
FILED
DEC 3 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF FOR RESPONDENT REA EXPRESS, INC. IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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REPLY BRIEF FOR RESPONDENT REA EXPRESS, INC. IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Preliminary Statement

Respondent REA EXPRESS, INC. ("REA") submits this brief pursuant to Rule 41(3) in reply to the untimely *amicus* brief filed by the United States.

This Court invited the Solicitor General to file a brief, as *amicus curiae,* expressing the views of the United States at the time it granted certiorari (No. 73-1543, 42 U.S.L.W. 3666 (June 3, 1974)).

Briefing by the parties herein was completed in the third week in August, yet the *amicus* brief was not mailed until October 10, 1974.

Rule 42(2) of the Court provides:

> "A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case *and presented within the time allowed for the filing of the brief of the party supported.*" (Emphasis added.)

Although Rule 42(4) provides that consent need not be obtained when the brief is filed on behalf of the United States by the Solicitor General, it does not waive or in any manner modify the requirements governing the time within which to file the *amicus* brief. Since the *amicus* brief of the United States clearly supports the position taken by the petitioner, it should have been filed on or before July 18, 1974, and not nearly three months after that date.

Factual Statement

The *amicus* brief erroneously states that the acts of discrimination charged include hiring practices (Br. 4). However, discrimination in hiring practices was not charged and is not an issue in this case (Appendix 6a, 15a). The alleged acts of discrimination with respect to REA involve job assignments, promotions, and disciplinary procedures (6a), not REA's hiring policy or practices.

The *amicus* brief erroneously contends that REA does not assert *res judicata* as an alternate ground for affirming the judgment below (Br. 6, fn. 3). Certiorari was requested but denied on the question of whether the prior judgment had a *res judicata* effect (*Petition,* p. 3, question 2(c)). REA therefore did not address the question in its brief on the merits. However, REA's position that the prior judgment

did constitute *res judicata* is made clear by REA's brief opposing certiorari (Br. 21) as well as its answer in the District Court (Answer, ¶¶2, 8; Appendix, 52a, 54a).

ARGUMENT

I.

The Legislative History Is Contrary to the Position Taken in the *Amicus* Brief.

According to the *amicus* brief, Congress intended that litigation "normally" would be resorted to only upon the completion of the Commission's conciliation efforts; it is said that earlier litigation would "frustrate" that intention "by interfering with the Commission's conciliation efforts" (Br. 15).

Neither Title VII nor the legislative history of the Civil Rights Act of 1964 supports the intention ascribed to Congress by the *amicus* brief. On the contrary, both the legislation and the legislative history point in the opposite direction.

Title VII contemplates that private suits thereunder may be pursued even if conciliation efforts have not begun or are still underway, as the *amicus* brief itself acknowledges (Br. 15, fn. 7). Having specifically authorized Title VII suits to be brought while conciliation is pending, Congress surely did not intend a different result with respect to suits under the 1866 Act.

After passage of the Civil Rights Act of 1964, this Court addressed the question of whether private discrimination

actions might be brought under the Civil Rights Act of 1866 in *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409 (1966).

Petitioners in *Jones* alleged that the respondents violated Section 1982 of the 1866 Act which, it was alleged, prohibited private discrimination in the sale or rental of housing. At the time, Congress was considering a comprehensive housing law. Accordingly, the Court addressed itself to the same issue as in this proceeding, *i.e.*, what effect, if any, would the new, comprehensive civil rights legislation have upon private rights under the 1866 Act (392 U.S. 409 at 417). The answer was clearly stated:

> "The Civil Rights Act of 1968 does not mention 42 U.S.C. §1982, and *we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute.*" (392 U.S. 409 at 416-417, fn. 20; emphasis added.)

Thus, when Congress came to consider the civil rights amendments of 1972, this Court had already indicated that subsequent civil rights legislation cannot be assumed to have any effect, "either substantive or procedural," upon the 1866 Act.

In considering the 1972 Equal Employment Opportunity Act, Congress rejected an amendment that would have made Title VII the exclusive federal remedy for employment discrimination (110 Cong. Rec. 13650-52 (1964)). The Report of the Senate Committee emphasized that "neither the provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill are meant to affect existing rights granted under other laws." S. Rep. No. 415, at 24, 92d Congress, 1st Session (1971).

Not only did Congress intend *not* to affect existing rights under the Civil Rights Act of 1866, but it also stressed the importance of allowing an individual to litigate discrimination claims in a federal court notwithstanding the pendency of conciliation activities by the Commission. The right of an individual who had filed a charge with the Commission to obtain a right-to-sue letter prior to completion of the Commission's conciliation activities was retained in the 1972 amendments for a specific reason:

> "In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 or 3 years before final conciliation procedures can be instituted. *This situation leads the committee to believe that the private right of action, both under the present act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.*". (Emphasis added.) House Education and Labor Committee Rep. No. 238, U.S. Code Congressional and Administrative News, 92d Cong., 2d Session (1972), pp. 2147-8.

How can it be maintained that Congress intended suits arising under the 1866 Act to *await* completion of Commission conciliation activities when Congress specifically stressed the desirability of making such litigation under Title VII available *prior* to that time as a means of escape "from the administrative quagmire"?

gave it the option of ... tolling ... gives same option

II.

A Chaotic Procedural Situation Would Develop From the Position Advocated in the *Amicus* Brief.

Damage claims in Section 1981 cases are subject to the right of trial by jury under the Seventh Amendment but the availability of a jury trial under Title VII is doubtful.* See *Curtis* v. *Loether,* 415 U.S. 189 (1974). Thus if the view in the *amicus* brief prevails, the claim of tolling with respect to Section 1981 suits will not end with EEOC proceedings: alert plaintiffs also will seek to apply the tolling argument to Title VII litigation as well so that, if the result is not favorable, a second bite of the apple can be sought in a Section 1981 case before a jury. This procedural Pandora's box should not be opened.

III.

Our Legal System Has Advanced Beyond *Peine Forte Et Dure.*

One can applaud the resuscitation of civil rights guarantees under the 1866 Act, after a century of neglect, without concluding that they should be turned into a kind of procedural *peine forte et dure.***

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* The result apparently will depend in part upon the availability of compensatory and punitive damages thereunder, an issue which as noted in Point IV below is still debatable.

** *Peine forte et dure* was an alternative to judicial trials in medieval England. 4 *Blackstone's Commentaries* 324-8 (1775). As to a party who stood mute and refused trial, *peine forte et dure,* or "pressing", involved piling enough weights on his chest either to extract a confession or render the dispute moot. *Knappen, Constitutional and Legal History of England* 197 (1942).

The *amicus* brief contends that *even if a private plaintiff succeeds in obtaining full relief against discrimination for himself* (p. 15), final disposition of his case would reduce an employer's incentive for "voluntarily" entering into a "more general conciliation agreement" which would have the purpose of "covering all employees and all forms of discrimination" asserted by the Commission (Br. 16), whether proved or unproved.

We submit that an attempt to hold a lawsuit in reserve, even though through it an individual claimant may more expeditiously succeed in obtaining "full relief from discrimination against himself" (Br. 15), solely so that the Commission can pile another weight on a respondent's chest to extract a "conciliation agreement," with the purpose of compelling acceptance of the Commission's *own* definition of what is required to eliminate "all forms of discrimination" with respect to "all employees," without any judicial scrutiny of the propriety of the Commission's views, particularly as to assertions of other types of discrimination not even germane to the original charge, is a kind of 1984 analogue to *peine forte et dure* which the courts should not countenance as an argument favoring "equitable tolling" and for which no support is found in existing civil rights legislation or the use of the word "conciliation." (42 U.S.C. § 2000e-5)

The Commission's argument suggests that the poor record in concluding its conciliation activities in a timely fashion is due to something other than the large backlog and limited budget assigned as the reason in the *amicus* brief (p. 16), and those reasons therefore should be rejected as a basis of decision in this case. As shown by the facts here involved, a right-to-sue letter was not issued

by the Commission until January 1971 (8a) following a "reasonable cause" determination in March 1970. This was *over three years* after the Commission's "*Final* Investigative Report" of December 22, 1967 (7a) (emphasis added). No word of explanation for the long delay is given. The "Final Investigative Report" itself is a detailed document of thirty printed pages (14a-44a). The statute itself requires the Commission to " . . . make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge. . . . " (42 U.S.C. § 2000e-5(b))

The settled policies of both the legislative and judicial branches of government favor the prompt resolution of disputes rather than saving them up to exert pressure. The purpose of statutory limitations periods as well as the equitable doctrine of laches is to avoid the litigation of stale claims. If reversal of this long-standing objective is desired, more should be required for that purpose than merely the assertion of an "equitable tolling" argument. As this Court said in rejecting a similar argument in *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U.S. 696, 702-3 (1966):

> " . . . although a uniform [limitations period] for §301 suits might well constitute a desirable statutory addition, there is no justification for that drastic sort of judicial legislation that is urged upon us." (Footnote omitted.)

IV.

The *Amicus* Brief Is Premised Upon Speculations for Which There Is No Legal Basis.

The *amicus* brief consists primarily of arguments for which there is little if any basis other than speculation. First, the tolling contention is premised upon the hypothesis that punitive and "more adequate" compensatory damages are available under the Civil Rights Act of 1866 but not under the 1964 Act, a premise that, with cases going both ways, it is impossible to establish until this Court makes a definitive ruling on the subject. See Goldberg, "Implying Punitive Damages in Employment Discrimination Cases," 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 325, 371 (1974), contending that claims for punitive and compensatory damages are maintainable under both Acts. See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which repeatedly stresses that the federal courts have been assigned "plenary powers" to assure compliance with Title VII (pp. 45, 47).

Second, the tolling question presented by the facts of this case is whether, because of tolling, a Section 1981 action can be maintained *even though the time for bringing a suit under the 1964 Act has clearly expired by virtue of specific statutory provision.*

The Court may desire to reserve decision on whether, in an appropriate case, tolling is available to extend the time for suing on Section 1981 claims to the period during which discrimination cases might be brought under Title VII, cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958), a possibility mentioned in footnote 10 of the *amicus* brief, although that, too, we submit, would constitute ju-

dicial legislation.* But on the facts of this case, which involve a period *beyond* the time in which Title VII litigation may be brought, tolling clearly should not be applied to extend the time longer than what Congress thought desirable in its most recent pronouncement on the subject.

V.

Picking and Choosing From Among Favorable Statutory Provisions and Ignoring the Others Is Not Statutory Construction.

The *amicus* brief does not deny that the Tennessee Statute of Limitations applies to this proceeding by virtue of 42 U.S.C. §1988. Instead, it seeks to *avail* itself of the state *savings* statute so that it, *coupled with* tolling, would keep the Section 1981 claim open after the Title VII claim has expired (Br. 8, 17, fn. 10). But this is a perversion of the Tennessee statute and the legal process. Statutory construction surely involves something other than picking and choosing from among those statutory provisions favorable to a party's position and ignoring the others.

The *amicus* brief errs in stating that "petitioner's second civil action was timely" under the state savings statute (Br. 8). The savings statute applies *only* if the original suit was commenced in time. The opening phrase of the savings statute is *"If* the action is commenced *within the time limited by a* rule or *statute of limitation.* . . ." (Tenn.

* Neither of the two lower court decisions relied upon in the *amicus* brief (p. 22) involved the question here involved, namely, whether a state statute of limitations was tolled *beyond* the time in which a suit under Title VII could have been brought. See *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), and *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971). In both cases, the lawsuit was still timely under Title VII, unlike the case at bar.

Code Ann. §28-106; emphasis added.) The original suit not having been commenced within the time prescribed by state statute of limitation, or tolled by the specific statutory tolling provisions (see discussion on p. 7 of REA's initial brief), the savings statute is not applicable. In such circumstances, tolling is not permitted. See *Ammlung* v. *City of Chester,* 494 F.2d 811 (3d Cir. 1974); *Hughes* v. *Smith,* 264 F. Supp. 767 (D.C. N.J. 1967), aff'd 389 F.2d 42 (3d Cir. 1968).

Reliance upon the Tennessee savings statute at the same time that the statutory tolling provisions are ignored represents not only faulty statutory construction but also an abrogation of the direction given by Congress in 42 U.S.C. §1988 that "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to *and govern* the said [district] courts in the trial and disposition of the cause . . . . " (Emphasis added.)*

* All of the lower court decisions cited on p. 21 of the *amicus* brief are alike and distinguishable in that they apply to tolling under a *federal* statute of limitations. In broadly asserting that this case is governed by "federal equitable tolling principles" (Br. 17, fn. 9), while at the same time admitting that it is otherwise subject to the state statute of limitations, the *amicus* brief ignores the recent decisions which are to the contrary. See *Ammlung, supra; Blair* v. *Pago Aircraft Maintenance, Inc.,* 467 F.2d 815 (5th Cir. 1972); *Bell* v. *Acrodex, Inc.,* 473 F.2d 869 (5th Cir. 1973). The *Blair* case is particularly significant because it, like the case at bar, involved administrative delay caused by governmental agencies (there, the Departments of Justice and Labor), yet the court held that, under state law, no tolling applied. The court further observed that (467 F.2d at 820), "As a matter of policy, which is to be set by Congress and not by the Courts, our decision will strengthen, rather than impede, the speedy receipt of the remedies which Congress sought to protect." *Moviecolor Limited* v. *Eastman Kodak Company,* 288 F.2d 80 (2d Cir. 1961), certiorari denied, 368 U.S. 821, relied on in the *amicus* brief (p. 17, fn. 9), involved *dictum* not necessary for the decision and is further distinguished at pp. 12-13, *infra.*

VI.

Tolling Is Not Appropriate in the Circumstances of This Case.

The *amicus* brief entirely misconceives the doctrine of tolling applied in other cases decided by this Court. The decisions of this Court relied upon involved the tolling of limitations periods under *federal* statutes, not under applicable state statutes of limitations. Thus, *Order of Railway Telegraphers* v *Railway Express Agency, Inc.*, 321 U.S. 342 (1944), involved a timely suit on an Adjustment Board award within the limitations period under the Railway Labor Act; *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965), involved the three-year limitations period under the Federal Employers' Liability Act and reached a tolling result based upon the interest in national uniformity expressed in the federal legislation (p. 435); and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), involved the four-year limitation period applicable under the Clayton Act to federal antitrust suits. The opinion in *American Pipe* specifically distinguishes cases like that here involved "where Congress has been silent as to the period within which federal rights must be asserted" (414 U.S. at 556), with the holding explicitly predicated upon the time limitation found in a federal statute (414 U.S. at 556-9).

In support of its asserted doctrine of "federal equitable tolling principles", the *amicus* brief cites two cases which are not apposite here (Br. 17, fn. 9): *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) and *Moviecolor Limited* v. *Eastern Kodak Company*, 288 F.2d 80 (2d Cir. 1961).

These cases are distinguishable from the circumstances presented in the instant case on four major grounds.

First, neither *Holmberg* nor *Moviecolor* involved a situation where the court was requested to toll the running of the limitations period as to one federal statute because of the initiation of proceedings under another. In both *Holmberg* and *Moviecolor,* the grounds for tolling were limited *to the statutes under which the plaintiffs asserted their rights.* Action taken under a second statute was not involved in either case.

Second, both *Holmberg* and *Moviecolor* involved the equitable doctrine of estoppel or fraudulent concealment which has long served as a basis for tolling the running of the statute of limitations.

Third, neither of the two federal statutes involved in *Holmberg* and *Moviecolor, viz.,* the Clayton Act and the Federal Farm Loan Act, contained a provision similar to 42 U.S.C. §1988 which specifically requires the application of *state common and statutory law* in proceedings under Section 1981 to the extent federal law is lacking.

Fourth, in *Holmberg* and *Moviecolor,* the courts were not confronted with state statutes directly forbidding the tolling of the limitations periods as this Court is in the present proceeding. In neither case was a legislative policy against tolling involved, and the courts therefore were free to fashion their own policies.

The leading decision of this Court on the subject of tolling in cases which, like this, involve no federal limitation period is *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U.S. 696 (1966). The decision there specifically dis-

tinguished *Burnett, supra,* relied upon heavily in the *amicus* brief (pp. 19-21), on the ground that, in *Burnett,* "a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision" (383 U.S. at 708). Finding that that was "the primary underpinning of *Burnett*" (*ibid.*), this Court refused to hold the principle applicable to a suit under Section 301 of the Labor-Management Relations Act where Congress had not expressed a national policy of a uniform time bar, and applied the state limitations provision, finding that the six months' provision governing unfair labor practice proceedings in an analogous federal labor law provision, "suggests that relatively rapid disposition of labor disputes is a goal of federal labor law" (*id.* at 707).

We submit that the case at bar presents an *a fortiori* situation to that in *Auto Workers.* Here, Congress has left no doubt that a uniform time bar is *not* "a primary underpinning" of the Civil Rights Act of 1866, and has specifically directed the courts to apply the remedial provisions of state law (42 U.S. §1988).

In summary, unlike the decisions of this Court relied upon in the *amicus* brief, this case does *not* involve the issue of tolling a federal statutory limitation period; indeed, the tolling sought here (a) would result in a longer period of time for bringing suit than Congress itself more recently provided in the most analogous statutory provision; (b) is in the face of a federal statute directing that *state* law shall apply (42 U.S.C. §1988); and (c) is contrary to the state statutory provisions specifically barring tolling in the circumstances of this case (Tenn. Code Ann. §28-301).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals on the issue of tolling should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day caused to be served the above reply brief upon Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530; Deborah M. Greenberg, Esq., Suite 2030, 10 Columbus Circle, New York, New York 10019; James L. Highsaw, Jr., Esq., Highsaw & Mahoney, Suite 506, 1015 18th St., N.W., Washington, D.C., by first class mail postage prepaid.

Dated: New York, New York
December 2, 1974

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